

Supreme Court, U. S.

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IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1977

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No. **77-1259**

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BEN R. HENDRIX TRADING CO., INC.,  
Petitioner,

versus

J. HENRY SCHROEDER BANKING CORPORATION,  
CLAUDIO CASTANEDA, SHERIFF OF HIDALGO  
COUNTY, TEXAS, W. MICHAEL BLUMENTHAL,  
SECRETARY OF THE TREASURY OF THE UNITED  
STATES, ALAMO EXPRESS, INC., KEN KELLAR, d/b/a  
EXPORTS, INC. AND JUD BRADY, d/b/a BRADY'S,  
Respondents.

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PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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BRADY, d/b/a BRADY'S,  
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PETITION FOR A WRIT OF CERTIORARI  
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FOR THE FIFTH CIRCUIT

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Petitioner<sup>1</sup> prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case.

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<sup>1</sup> Petitioner was a plaintiff-defendant in trial court and plaintiff-appellant-cross-appellee in the Fifth Circuit.



## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, dated October 11, 1977, (3a-9a), reported at 560 F. 2d 1192, the judgment (1a-2a), entered on October 11, 1977, and the Order of the Fifth Circuit, denying Petition for Rehearing, dated December 13, 1977, (9a-10a), here sought to be reviewed, are reproduced in the Appendix.

The opinion of the District Court may be found at 373 F. Supp. 1283.

## JURISDICTION

Under 28 USC §1254(1) civil cases in the United States Court of Appeals may be reviewed in this Court by writ of certiorari upon the petition of any party.

Certiorari is requested on the following bases found in Rule 19(b) of this Court:

1. It is an important question of federal law, which has not been, but should be settled by this court.
2. It has sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

Certiorari is requested additionally since the lower court has in effect ignored the rulings of this Court, and destroyed a Treaty of the United States.

The Fifth Circuit's opinion and judgment, which Petitioner asks be reviewed, were entered October 11, 1977, and the timely application for rehearing en banc was denied by the Fifth Circuit on December 13, 1977.

According to 28 USC §1201(c) and *Bowman v. Loperena Marina* (1940) 311 U.S. 262, 266 the 90 day period would commence on December 14, 1977 and the last day for filing would be March 13, 1978.

According this Court's jurisdiction is invoked under 28 USC §1254(1) and Supreme Court Rule 19(b).

## QUESTION PRESENTED

Can a request for a Declaratory Judgment concerning a jurisdiction of a State court over chattels "in transit" in international commerce be moot because the company whose goods were seized by state officers, sought protection under Chapter XI of the Bankruptcy Act, which Bankruptcy court subsequently during the appeal sold the goods in question to prevent further loss and storage costs.

## CONSTITUTIONAL PROVISIONS, TREATIES STATUTES, ORDINANCES OR REGULATIONS CONCERNED

Relevant international law is the General Agreement on Tariffs and Trade (GATT), 61 Stat pts 5 & 6 at A3, TIAS 1700, 4 Bevans 639, 55-61 UNTS., and "The right of way or passage."

Relevant federal law is GATT; the Constitution of the United States, Article I, Section 8, Clause 3 (the Commerce Clause);

Article 6 Cl. 2 (Supremacy Clause) United States Constitution (b); "all treaties made under the authority of the United States shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding".

Constitution of the United States Sect. 8. POWERS GRANTED TO CONGRESS (j) "to define and punish piracies and felonies committed on the high seas and offenses against the laws of nations".

Piracy was illegal stealing at sea or on land after a descent from the sea.

the Tariff Act of 1930; 19 C.F.R 19.6c; 19 Op. Atty. Gen. 101, as well as the 14th Amendment to the Constitution.

Relevant Texas law is the former Tex. Civ. St. Art. 6840 and the former Texas Rules of Civil Procedure, rules 696-716

### STATEMENT OF THE CASE

This case was the consolidation of two cases brought in the United States District Court for the

Southern District of Texas, at Brownsville, Reynaldo G. Garza, J., 373 F. Supp. 1283. The actions were filed by J. Henry Schroeder Banking Corp. (hereinafter referred to as Schroeder) and Ben R. Hendrix Trading Co., Inc. (hereinafter referred to as Hendrix) seeking declaratory relief concerning the attempted seizure by Schroeder of certain bonded liquor of Hendrix consisting of 25 trailerloads (20,000 cases) which was destined for Mexico. Schroeder filed a petition for writ of sequestration in a Texas court claiming a security interest under the Uniform Commercial Code which has since been declared invalid. The clerk of court issued the writ under applicable Texas law which has since been declared unconstitutional. The Texas Sheriff attempted to take possession of the goods, but Customs who were in joint possession with Hendrix and others under federal law refused to heed the State court order, advising Schroeder and the Sheriff that such actions were in violation of federal law. During the power struggle Hendrix was dispossessed and was unable to operate. An employee of Hendrix attempted to negotiate a compromise without authority but this failed as well. Both parties sought relief in federal court, Schroeder to have the seizure declared valid and Hendrix to have the seizure and the jurisdiction of the state court declared invalid. After deciding that the only Supreme Court case on point was no longer valid, ignoring the Texas decision on point, GATT and federal law, the district court found that the state court could adjudicate ownership of the goods in question. Soon after Hendrix sought protection under Chapter XI of the bankruptcy act, as a debtor in possession. Then the appeal to the Fifth Circuit was filed. During the pendency of the appeal, the bankruptcy court over



the objection of Hendrix sold all the goods that had been seized by Schroeder. The question of mootness was raised in the appeal and contested by various memoranda, briefs, reply briefs and oral argument. After almost a year after oral argument the Fifth Circuit handed down its opinion. Almost at the same time, the Bankruptcy Court validated state court jurisdiction as the District Court had done, invalidated any secured claim of Schroeder under the originally claimed UCC security agreement on the grounds that the agreement had never been signed by Hendrix, but held that Schroeder was a secured creditor for having seized the goods through the state court. The Bankruptcy Court also held that all parties which held the goods in storage during the fight were secured creditors. An appeal to the District Court has been filed in the bankruptcy matter.

### STATEMENT OF FACTS

Ben R. Hendrix Trading Co., Inc. is a Louisiana corporation which had its principal office in New Orleans and was qualified to do business in the State of Texas. Hendrix was in the business of international trade and had had a long business relationship with J. Henry Schroeder Banking Corporation, a New York Corporation not qualified to do business in Texas, which is wholly owned by a London based international banking firm which has been in business for generations.

In 1973 after some dispute arose about a loan, Schroeder Bank filed in Texas an unsigned UCC financing form which it alleged grew out of a Loui-

siana agreement. As any freshman law student knows, Louisiana does not recognize the UCC as valid, in fact many policies of the UCC are contra to the public policy of Louisiana which uses the Civil or Roman based law. This has been codified in its present form in Louisiana since 1825.

Schroeder secured a writ of sequestration based on the UCC claim from the Clerk of the District Court of Hidalgo County, being the 93rd Judicial District of the State of Texas, and an affidavit that Schroeder was authorized to do business in Texas.

Thereupon Mr. Castaneda, as the Sheriff of Hidalgo County tried to seize and take custody of the goods which were under custody of the U.S. Customs and which were being shipped from various ports in Europe to Mexico through the United States via the Foreign Trade Zone No. 2 in New Orleans, La. These in bond, intransit goods consisted mostly of various alcoholic beverages which because of various federal laws could not have been entered into the commerce of the United States even if Hendrix had so desired.

After attempts to sell the goods failed because of Customs resistance, the federal actions for declaratory relief were filed.

### REASONS FOR GRANTING THE WRIT

Hendrix addresses several legal questions. First, it argues that the question is not moot, then it raises three legal propositions as to why the seizure by Schroeder was unconstitutional and in violation of international and federal law.

### On The Question Of Mootness

Chief Judge Brown on page 170 of the opinion (6a-8a) speaks of "Mootness in the Moonshine." First, the matter is clearly not moot and second, the liquor involved included expensive spirits from Scotland and French champagne, wines and cognacs.

The Fifth Circuit would have us believe that the forced sale of approximately one million dollars worth of expensive spirits for about one half of the normal value in trade circles ended any case or controversy. These spirits were stored in part in sealed trailers in the hot south Texas sun, under which conditions, champagne and wine are quite perishable. This situation is analogous to that Admiralty Rule E (9)(b) contemplates, which rule permits the interlocutory sale of attached or arrested property if it is liable to perish, deteriorate or decay on account of the custody. The bankruptcy court ordered the goods sold, perhaps not in the best manner, but in the correct interest of preventing further loss.

The Fifth Circuit is not correct at page 170 (6a) when it states, "During the course of the Chapter XI proceedings, all parties moved to sell the liquor." Actually the largest creditor, First National Bank of Commerce, New Orleans filed a motion on August 8, 1975 opposing the sale, Hendrix having filed a similar motion on August 7, 1975 and have previously requested to sell the goods in the ordinary course of business under the previously granted authority as Debtor in Possession, in order to obtain the best price.

The Fifth Circuit in its opinion on page 169 (5a) alleged that Hendrix sued "to have the attempted sheriff's sale and underlying state court order declared void." However this is not the essence of the prayer of Hendrix. The essence was a declaratory judgment concerning the lack of jurisdiction of the State to affect those goods in question and as a consequence Hendrix prayed for a declaration that such acts without power or jurisdiction be declared void.

The District court below held that the state court had jurisdiction to seize the goods in question, yet the Fifth Circuit seemingly held on page 170 (6a-7a) that Hendrix had such control over the goods "Seized" to surrender them to the Bankruptcy Court. This portion of the opinion is confusing to say the least. If the state court has jurisdiction, then the action by the bankruptcy court was void. In fact by letter to the Hon. E. H. Patton, Jr., the bankruptcy judge, dated October 13, 1977, the attorney for Schroeder, says:

"In the enclosed decision, the Fifth Circuit rejected an appeal by Hendrix that ruling [Judge Garza's holding that state had jurisdiction.], holding the matter is moot. This action thus leaves undisturbed Judge Garza's ruling that the state court garishments and seizures are valid and had the effect of placing the goods in *custodia legis* of the state court." Judge Garza held the General Agreement of Tariff and Trade to be "fictitious" and the Tariff Act of 1930 to be "antiquated". This was not reported in the 373 F. Supp. 1283.



Hendrix sought and still seeks a ruling that the state court had no jurisdiction. The alleged compromise agreement could not confer any consent jurisdiction since as pointed out below, it is contra to applicable Louisiana law, and was done without authority.

Justice Holmes in *McDonald v. Mabee* (1917) 243 U.S. 90, summed up jurisdiction well, "The foundation of jurisdiction is physical power . . . ." The Sheriff had then to have the goods so within his power to confer jurisdiction to the state court that he could touch or remove them. (See 70 Am Jr 2d 155, *Odiorne v. Colley*, 2 NH 66) Yet customs regulations and the tariff act prohibited that and indeed prohibited entry of the goods into the United States. Even more persuasive an argument as to the state court lack of jurisdiction is the Texas case of *Galveston, H & S A Ry Co. v. Terrazas* (Tex. Civil App. 1914) 171 S. W. 303, which is on point, held no jurisdiction as to the Texas courts over such merchandise and which under *ERIE* all federal courts are bound to follow.

The opinion in the district court is in direct conflict with *Galveston* and cannot be allowed to stand.

The judgment of the State court has certain consequences according to the Bankruptcy Court which on October 13, 1977 held that the action of the state court being valid, Schroeder Bank had secured creditor status based on the garishment concept, even though Schroeder had no valid claim to security or lien under an alleged UCC agreement which was invalid under Texas law. Clearly then the State court jurisdictional question still has an effect on Hendrix which is now

forced to appeal the ruling of the bankruptcy court. Such mootness, alas leads to great judicial economy.

Hendrix sought declaratory relief concerning unlawful seizure, the Fifth Circuit was told in oral argument to provide a base for a possible damage suit against Schroeder and to rate the creditors. To declare this case moot the Fifth Circuit must have held that judgment, if rendered, would neither have direct or collateral effect on plaintiff (Hendrix), Hendrix would not be able to obtain further relief based on judgment under 28 USC 2202, and no other relief is sought in the action. (See: *Danzy v. Johnson*, 1976 DC Pa., 417 F. Supp. 426.)

This action is a collateral attack on an allegedly invalid state court action and should not be declared moot.

As a consequence of all legal actions, particularly seizures, certain costs are incurred. The costs in this case for storage, etc. are in excess of \$100,000.00. With various attorney's fees taxed as costs the claims are easily twice that amount. Many of these claims have been held by the bankruptcy court to be secured and payable out of the estate of Hendrix, whereas if the state court had no jurisdiction, then these costs would be taxed as costs to Schroeder and payable out of its bond for wrongful seizure.

On page 170 (8a) of the decision the Fifth Circuit held:

"The issues still alive in this case — disposition of the proceeds, amount of the debt still



owed, and the propriety of the prejudgment seizure — will be resolved by the Bankruptcy Judge in the first instance."

Well as Hendrix predicted, the bankruptcy court felt bound by the ruling of the District Court so out of the judicial mill came a curious decision. The bankruptcy court held that Schroeder had no initial lien or security when it commenced the state court action, therefore it would appear that this was a state court attachment of goods intransit in international commerce, however even though Schroeder had no authority to seize the goods that it did, nevertheless having thereby obtaining a judgment and garnishment, Schroeder then obtained security and all the costs incurred as a result of Schroeder's seizure were secured. As a result the assets of Hendrix have been divided between Schroeder and the persons storing the goods.

If however this court were to hold that the State court had no jurisdiction then the following would result:

1. The security given Schroeder by the bankruptcy court would fall.
2. Schroeder would then be liable for all costs of storage.
3. Schroeder would be liable to Hendrix and Hendrix's other creditor's for damages, which would result in all innocent creditors receiving their money.

The Fifth Circuit relied on your recent study in "sidestepping" (416 U.S. 350, 40 L. Ed. 2d 188), otherwise known as *DeFunis v. Odegaard*, 1974, 414 U.S. 312, 94 S. Ct. 1704, 40 L. Ed. 2d 164 as dismissing the case as "moot". This court is well aware of the outcries concerning that decision.

Hendrix true is no longer in the active business of handling bonded merchandise, but only because of the actions of Schroeder. Thus a return to the old horror story of wrongful death actions, if the tortfeasor killed the victim, then he was safe from legal action, what the Fifth Circuit holding in effect says, is that since Schroeder "killed" Hendrix, then Hendrix has no cause of action, since it cannot likely be "killed" again. Hendrix, gentlemen, is wounded but not dead. The Fifth Circuit tried to bury Hendrix, after kicking it a couple of times, but here is Hendrix kicking up a fuss about the whole mess. Hendrix still is in existence, its federal licenses have not been revoked, and should it prevail here it could commence active business again.

Since Judge Garza's opinion in the original district court case is reported as *J. Henry Schroeder Banking Corporation v. Schultz* (1974) 373 F. Supp. 1283, and has been indexed in various legal reference sets the problem is "capable of repetition, yet evading review." [See *Moore v. Ogilvie* (1969) 384 U.S. 814, 23 L. Ed. 2d 1, 89 S. Ct. 1493] Either Hendrix or another similar person may be subjected to the same type of "seizure" in state courts.

Furthermore, since the sale of the goods occurred after this appeal was filed, and was merely to reduce

the damages to the goods, then the appeal was not mooted by the sale. Also we have a question of rather large group of appeals costs which according to the judgment of the Fifth Circuit are to be taxed against Hendrix, which is a penalty and which destroys any notion of "mootness" since the allocating of costs against the plaintiff serves to violate due process by chilling the right to seek legal redress of wrongs and depriving the plaintiff of property without a hearing, for the concept of "mootness" is based on lack of jurisdiction of the courts, and if the court cannot decide the case then the court has no jurisdiction to decide any part of it, including the allocation of costs.

#### Unconstitutionality Of The Sequestration

According to the most recent holdings of the Supreme Court of the United States, a prejudgment seizure of chattels without the intervention of a judge and showing a valid basis of the seizure order is unconstitutional.

You have held that State prejudgment replevin provisions work a deprivation of property without due process of law under the 14th Amendment when they deny the right to prior opportunity to be heard before the chattels are taken.<sup>2</sup> And garishment without participation of a judge and without notice or opportunity for an early hearing has also been struck down.<sup>3</sup>

<sup>2</sup> *Fuentes v. Shevin* (1972) 407 U.S. 67, 32 L. Ed. 2d 556, 92 S Ct 1983.

<sup>3</sup> *North Georgia Finishing, Inc. v. Di-Chem, Inc.* (1975) 419 U.S. 601, 42 L. Ed. 2d 751, 95 S. Ct. 719.

Taken together the actions in state court clearly violate the standards for due process and would be void even if no other basis existed for attack.

The Fifth Circuit was urged to ignore the argument that the seizure complained of was invalid on constitutional grounds because this issue was not raised below.

During the pendency of this appeal the same court below, in fact the same judge, who sustained the sequestration of goods in question, declared that sequestrations in Texas under applicable Texas law denied due process of law in violation of the 14th Amendment. Judge Garza declared Tex. Civ. St. Art 6840 and Texas Rules of Civil Procedure, rules 696-716 unconstitutional in *Garcia v. Krausse*, (S.D. Texas, Aug. 23, 1974) 380 F. Supp. 1254. Texas enacted a valid statute which became effective in Sept. 1975. *Garcia* was subsequently remanded to the District Court on procedural grounds, but it is a class action and Hendrix is a member of the protected class.

#### Lack of State Jurisdiction — Federal Law

The laws of the United States prohibit a state court from exercising jurisdiction over chattels in foreign commerce and not "in" the state, and since goods in foreign commerce are not in the United States, neither can a District Court of the United States exercise jurisdiction "in rem" over them.

Article I, Section 8, Clauses 3 & 4 of the Constitution of the United States provides:

The Congress shall have the power

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.
4. To define and punish piracies and felonies committed on the high seas and offenses against the laws of nations.

The general rules for jurisdiction are found in the **RESTATEMENT, SECOND, CONFLICT OF LAWS** and as to Judicial Jurisdiction over Chattels, sec. 60 provides:

A State has power to exercise judicial jurisdiction to affect interests in a chattel in the state, which is not in the course of transit in interstate or foreign commerce.

25 CJS 211 also provides the rule for a case such as is at hand to the effect that warehousing goods under statutory provisions is to place them in possession of the United States; and no lien thereon can be obtained by an execution creditor. This court also stated the principle in somewhat different fashion in *Harris v. Dennie*, (1830) 8 U.S. 422, at 426; 3 Peters 292, 304:

"Goods imported and not entered are in custody of the United States and cannot be attached upon State process. The United States having a lien on the goods for the payment of

the duties accruing thereon and being entitled to a virtual custody of them from the time of their arrival in port until the duties are paid or secured, any attachment by a state officer in an interference with such lien and right of custody and, being repugnant to the laws of the United States, is void."

19 C.F.R. 19.6c, note 11 also provides that:

"Imported goods in bonded warehouses are exempt from taxation or judicial processes of any State or subdivision thereof . . ."

There has been no dispute of the facts that the goods in this case were in bond in the custody of Customs, could not have been entered into the U.S., originated in Europe and were destined for Mexico. These goods were clearly in foreign commerce.

The leading Texas case on the subject, *Galveston H. & S. A. R. Co. v. Terrazas*, (Tex. Civ. App. 1914) 171 S. W. 303 which is binding on Federal courts under the *Erie* doctrine, held that Texas State courts have no jurisdiction over goods in the state under Customs bond.

The District Court seemed to think it had "in rem" jurisdiction under 28 USC 2463, but that section provides for jurisdiction only in the cases of Fines, Penalties and Forfeitures.

The Attorney General in 19 Op. Atty. Gen. 101 held that in a case wherein the U.S. Marshal of the District



Court for the Southern District of New York, attempted to attach goods in bond in accord with a court order that:

"Imported merchandise, while in the custody of the customs officers, is not subject to attachment at the suit of private parties; and those officers should pay no attention to process of that kind against such merchandise when served on them."

The Fifth Circuit properly held in their opinion on page 170 (7a) that Hendrix had custody and possession of the goods so as to surrender them to the Bankruptcy Court for protection and preservation under the Chapter XI arrangement wherein Hendrix was appointed by Court Order dated August 16, 1974, Debtor in Possession and Trustee with full powers and placed them in possession of all its assets where ever located. This Order has never been appealed or revoked.

#### **Lack of State Jurisdiction — International Law**

No judicial officer may seize goods "in transit" under international law, since adequate remedy can be had in the courts of the domicile of the shipper and the consignee and such an act of seizure is a type of piracy.

The concept of free movement of goods in international commerce through other nations is old perhaps having its origin in the times or pre-history when traders made their way from kingdom to kingdom. Most states then did not border on the sea and therefore overland trade was essential. Even today

many nations would be subject to starvation by their neighbors if it were not for International Law doctrines of "Freedom of Transit" or "Right of Passage".

Modern international law is based in good part on Roman or Civil law and all Civil law jurisdictions including Louisiana have a legal servitude on property of the right of passage or way. Barry Nichols in *An introduction to Roman Law* (Oxford) at page 148 states that the English Law of Easements particularly the fundamental work by C. J. Gale (1839) is taken almost in toto from Roman law and from Lord Bracton's borrowings from the Roman law.

This law developed into International Law by custom, which Kelsen<sup>4</sup> tells us is just as valid as legislation. Kelsen<sup>5</sup> also advises that the principles of Grotius, Puffendorf and Vattel also became binding by custom on nations. Article 38 of the Statute of the International Court of Justice also provides that the Court shall apply such custom as did the same Article provide for like application by the Permanent Court of International Justice previously.

In the case of *The S. S. Wimbledon* (1923) P.C.I.J., Ser. A, No. 1; 1 Hudson, World Court Reports 168, it was held that Germany could not refuse free access to the Kiel Canal, to that ship even though Germany was neutral and the ship was English under French charter, carrying 4,200 tons of munitions for Poland. This

<sup>4</sup> Kelsen, Hans, *Principles of International Law*, 2d Ed., ed. by Robert W. Tucker, Holt, Rinehart & Winston, p. 441.

<sup>5</sup> Op. cit., p. 443.

is the leading case on the right of passage, which is an international servitude.

Vattel in Book II, Chapt. IX, sec. 127-Book II, Chap. X, sec. 134 discusses the existence of that right, also in regards to the right of passage of merchandise (sec. 134). Vattel's *Law of Nations*, is of course the classic work on the subject and in sec. 132 he cites the case of the Count of Lupfen, who was condemned by Emperor Sigismund to pay damages for having stopped goods going through Alsace. It was held that roads are free to all men rich and poor.

Puffendorf in his *Law of Nations*, covers the same subject in Book 3, ch. 3, s. 6, p. 29.

The modern law on the subject is codified in the General Agreement on Tariffs and Trade (GATT), 61 Stat pts 5 & 6 at A3, TIAS 1700, 4 Bevans 639, 55-61 UNTS, particularly Article V which concerns Freedom of Transit. The parts applicable to this case are paragraphs 1, 2, and 3, particularly paragraph 2. They read as follows:

#### ARTICLE V

##### Freedom of Transit

1. Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without transshipment, warehousing, breaking bulk, or change in mode of transport, is only a portion

of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this Article "traffic in transit".

2. There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.

3. Any contracting party may require that traffic in transit through its territory be entered at the proper custom house, but, except in cases of failure to comply with applicable customs laws and regulations, such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered.

GATT is an executive agreement, made pursuant to Congressional authority but is nevertheless binding



as a treaty. A lengthy discussion of GATT as domestic law is available in either Professor Jackson's law review article<sup>6</sup> or his book.<sup>7</sup> I will assume that it is valid for if this court would hold that the President cannot obligate the United States in such a manner this case would be in quite a turmoil since both Texas and Hawaii were annexed using the same procedure or one quite similar and thus Texas would then be perhaps still an independent state and this Court would have no jurisdiction as would also be the case with the District Court of Texas.

GATT permits only reasonable delays except in cases of failure to comply with applicable customs laws and regulations, and certainly not seizures. Even in admiralty law it is fundamental that a ship may, but the cargo may not be seized.

There are no cases on Article V of GATT, perhaps due to the fact that the rest of the world assumes that the freedom of transit being such an old and established doctrine, the freedom of transit is absolute.

The district court seemed to concern itself with a practical matter of enforcement of payment of a debt. Hendrix has never denied that it owed Schroeder some money. The amount owed is disputed and the manner of attempted collection is alleged to be illegal under the legal doctrines previously cited. If A owes B an amount of money, A can sue B or A can subvert the law

<sup>6</sup> Jackson, John H., *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 Mich. L. R. 249 (1967).

<sup>7</sup> Jackson, John H., *World Trade and the Law of GATT*, Bobbs-Merrill, New York, 1969.

by sending over a collector to take goods from B, do or threaten B harm. The latter means of collection are far more effective than the legal methods of course, but they are illegal.

It is obvious that Schroeder Bank had several options open:

- 1.) It could have sued Hendrix in state or federal court and seized bank accounts.
- 2.) It could have brought suit in Mexico demanding payment from the consignees.
- 3.) It could have sued in state in state or federal court and asked for a recognition of its alleged lien and an injunction to prevent Hendrix from wasting assets.
- 4.) Or it could have filed a petition for involuntary bankruptcy if Hendrix were insolvent.

But Schroeder decided to use strong arm tactics and attempt to seize the goods, and they are therefore liable to Hendrix for damages for wrongful seizure. In addition since the Sheriff seized without any authority he has taken goods from international commerce which is piracy.

### CONCLUSION

Certiorari should be granted to prevent this piracy which has been sanctioned by the courts of the United States, from going unpunished and to permit it to become precedent. For if you fail to do so, then "freedom of transit" will become meaningless and any vessel or aircraft or motor carrier would be liable to seizure or hijacking by any judicial officer, if some lien were alleged on chattels carried. Similarly any country could seize goods of a United States citizen using the District Court case as authority, since it holds that freedom of transit is meaningless. The issue does not only affect Hendrix, it affects all goods in interstate or international trade.

Respectfully submitted,

---

Glenn L. Morgan  
P. O. Drawer 51478  
New Orleans, La. 70151  
Counsel for petitioner  
BEN R. HENDRIX  
TRADING CO., INC.

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing petition were sent to the following counsel by U.S. Mail on the \_\_\_\_ day of March, 1978:

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Edinburg, Texas 78539

Mr. William L. Bowers, Jr.  
Office of the United States Attorney  
P. O. Box 61129  
Houston, Texas 77208

---

Glenn L. Morgan

**APPENDIX**

**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

---

No. 74-2586

---

D. C. Docket No. CA 73-B-127 & 128

**J. HENRY SCHROEDER BANKING CORP.,  
Plaintiff-Appellee,**

**versus**

**W. Michael BLUMENTHAL, Secretary of the Treasury  
of the United States, et al.,  
Defendants-Appellees-Cross-Appellants.**

**BEN R. HENDRIX TRADING CO., INC.,  
Plaintiff-Appellant-Cross-Appellee,**

**versus**

**J. HENRY SCHROEDER BANKING CORP. et al.,  
Defendants-Appellees.**

**Appeals from the United States District Court for the  
Southern District of Texas**

**Before BROWN, Chief Judge, HILL and FAY, Circuit  
Judges.**

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JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, remanded to the said District Court with instructions in accordance with the opinion of this Court;

It is further ordered that plaintiff-appellant cross-appellee pay to plaintiff-appellee, defendants-appellees cross-appellants and defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

October 11, 1977

Issued as Mandate: NOV. 2, 1977

Re-Issued as Mandate:

3a

J. HENRY SCHROEDER BANKING CORP.,  
Plaintiff-Appellee,

versus

W. Michael BLUMENTHAL, Secretary of the Treasury  
of the United States, et al.,  
Defendants-Appellees-Cross-Appellants.

BEN R. HENDRIX TRADING CO., INC.,  
Plaintiff-Appellant-Cross-Appellee,

versus

J. HENRY SCHROEDER BANKING CORP. et al.,  
Defendants-Appellees.

No. 74-2586.

United States Court of Appeals,  
Fifth Circuit.

Oct. 11, 1977.

Appeals from the United States District Court for  
the Southern District of Texas.

Before BROWN, Chief Judge, HILL and FAY, Circuit  
Judges.

JOHN R. BROWN, Chief Judge:

This lawsuit involves goods, principally liquor, in  
Customs' bond which were seized from the bonded



warehouses in two Texas counties. Due to the voluntary filing of an arrangement under Chapter XI of the Bankruptcy Act, followed by a judicial sale to which all parties consented, we hold that the issue of an earlier-challenged seizure of the liquor is now moot.

### *Simon Says "No"*

This dispute arose from a claim by the Henry J. Schroeder Banking Corporation (Schroeder), against Ben R. Hendrix Trading Co., Inc. (Hendrix), an import/export dealer. Since 1968 Schroeder had made loans to Hendrix to finance his inventory. The loans were secured by a lien on the assets. In 1973 when Hendrix was behind on the payment of a loan, Schroeder filed for foreclosure of the lien and a money judgment for the outstanding loan. The state court ordered sequestration of all the assets located either in Hendrix's own warehouse or in the warehouse under Customs' bond.

Subsequently a now controversial compromise agreement was entered into by Schroeder and Hendrix.<sup>1</sup> Under the agreement Hendrix admitted the amount of the debt and agreed to a judgment being entered against him. A sale of the assets was arranged by Schroeder. Hendrix, however, could sell the goods if he could find a buyer willing to pay more than Schroeder's buyer. An option clause gave Schroeder the right to sell the goods if Hendrix attempted to

<sup>1</sup> Hendrix claims that he was not bound by the compromise agreement since the person who signed it was not an authorized agent capable of binding the company. That issue, although not resolved earlier, is now also moot.

otherwise dispose of the property. Contending that Hendrix did just that, Schroeder obtained orders for a public sale of the liquor by the sheriff. Customs, speaking through Secretary of the Treasury, William Simon, objected and asked for reformed orders of sale. Although two sheriff's sales were attempted, Customs refused to release the goods either to the sheriff or to Hendrix. This federal suit ensued.

### *Federal Prohibition Revisited*

Two lawsuits were filed by the parties in federal court on the same day. Both sought declaratory judgments. Hendrix sued Schroeder, the Customs officials, and the Secretary of the Treasury, seeking to have the attempted sheriff's sale and the underlying state court order declared void.<sup>2</sup> Schroeder sued Hendrix and essentially the same other officials contending that the attempted seizure and sale were not in violation of federal law. Schroeder also sought mandamus to compel Customs to release the liquor and an injunction to prevent Hendrix from taking the goods from the warehouses. Customs counterclaimed by filing a bill in the nature of an interpleader, asking that if the federal court entertained the case, they be released from liability upon compliance with either the

<sup>2</sup> Hendrix contended that 19 CFR 19.6(c), note 11, which provides that:

Imported goods in bonded warehouses are exempt from taxation or judicial process of any State or subdivision thereof,

and the General Agreement on Tariffs and Trade (GATT), prevent a state court from ordering a sale of goods under Customs' bond pursuant to an *in personam* foreclosure suit on a secured note covering the warehoused goods.



state or federal process, as found appropriate by the federal court.

The Federal District Court held that the state court could adjudicate the ownership of the goods in question. The Court held that while the state court could direct compliance with Customs' regulations to effect a transfer of the title documents in question, its attempt to do so was void due to its failure to include the warehousemen in its order. The case was dismissed without prejudice to further pursue these matters in the state court or under Customs' laws and regulations. A supplemental order issued by the District Court held that Customs would be discharged from further liability upon compliance with properly executed warehouse receipts, whether done voluntarily or in response to orders of the state court.

#### *Mootness In The Moonshine*

Hendrix appealed from these orders, but after the instant appeal was filed Hendrix filed a Bankruptcy Chapter XI reorganization proceeding to work out an arrangement whereby control of the assets was maintained by him as a debtor in possession. During the course of the Chapter XI proceedings, all parties moved to sell the liquor. Hendrix sought privately to sell it as a debtor in possession and the creditors sought to have a trustee handle the transaction. The Bankruptcy Judge appointed a trustee who sold the merchandise and now holds the proceeds subject to the orders of the Bankruptcy Court. The appropriate

Customs and title documents were executed, Customs officials acted in accordance with these instruments, and the goods which were the subject of the controversy were delivered to the buyers.

Both Customs officials and Hendrix recognized that the Bankruptcy Court had power to order such a sale. Indeed, as debtor, Hendrix had enough power and control over the goods to surrender them to the Bankruptcy Court. Thereafter the goods were not subject to any restraint by state officials and were subject only to payment or security for Customs' duties. Hendrix owns no other merchandise or liquor under Customs' bond and is no longer actively involved in importing and exporting bonded merchandise.

The controversy that gave rise to the actions for declaratory judgments by both Hendrix and Schroeder was whether control of the liquor would be with Hendrix or with the state court officers and those who purchased it at the aborted judicial sales. Since the liquor has now been sold in an admittedly valid manner and is in the hands of third parties, none of the parties to the controversy below can be said to have any right of control over the goods. Thus, there is no longer any case or controversy. Hendrix owns no other merchandise in bond and is no longer in the business of importing and exporting bonded merchandise, so there is no likelihood that a similar controversy might arise in the future.

The Supreme Court established the starting point for determining mootness in *DeFunis v. Odegaard*, 1974, 416 U.S. 312, 316, 94 S.Ct. 1704, 1705-06, 40 L.Ed.2d

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164, 168-69. There, it said, the criterion for determining mootness "is the familiar proposition that 'federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.' " (Cites omitted).

This Court has before it Hendrix, Schroeder, and various Customs officials. Since the Customs' regulations have been met and Customs has agreed to the sale there is no decision that we could now reach on the issue before us that could affect Customs. Although Hendrix and Schroeder still have some interest in the Bankruptcy Court's disposition of the proceeds from the sale, there is no longer any live dispute between them over who has the right to possession and control of the inventory since by their consensual actions they both impliedly now agree that unquestionably the third party who purchased it at the sale is the only one with such a right. The issues still alive in this case — disposition of the proceeds, amount of the debt still owed, and the propriety of the prejudgment seizure — will be resolved by the Bankruptcy Judge in the first instance. It would be premature for this Court to dispose of those issues here.

Under the authority of prior Fifth Circuit decisions, this case has become moot due to the admittedly valid sale of the assets by the Bankruptcy Court in a proceeding voluntarily initiated by Hendrix, a sale to which all parties involved in the appeal consented. *Southern Bell Tel. & Tel. Co. v. United States*, 5 Cir., 1976, 541 F.2d 1151; *Barron v. Bellairs*, 5 Cir., 1974, 496 F.2d 1187; *National Lawyers Guild v. Board of Regents*, 5 Cir., 1974, 490 F.2d 97; *Merkey v. Board of*

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*Regents*, 5 Cir., 1974, 493 F.2d 790; *United States Servicemen's Fund v. Killeen Independent School District*, 5 Cir., 1974, 489 F.2d 693; *Gooden v. Mississippi State University*, 5 Cir., 1974, 499 F.2d 441. The case is therefore remanded to the District Court with instructions to dismiss it as moot under our uniform precedents.

REMANDED.

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UNITED STATES COURT OF APPEALS  
FIFTH CIRCUIT

OFFICE OF THE CLERK

December 13, 1977

TO ALL PARTIES LISTED BELOW:

NO. 74-2586 — J. Henry Schroeder Banking Corp., -vs-  
W. Michael Blumenthal, Secretary, etc., et al;  
Ben R. Hendrix Trading Co., Inc. -vs- J. Henry  
Schroeder Banking Corp., et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc has also been denied.

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See Rule 41, Federal Rules of Appellate Procedure for  
issuance and stay of the mandate.

Very truly yours,  
EDWARD W. WADSWORTH,  
Clerk

/s/ R. ADELINE BARNES  
Deputy Clerk

Mr. Benjamin S. Hardy  
Mrs. Ben R. Hendrix  
Mr. Glenn L. Morgan  
Mr. Charles C. Murray  
Mr. James R. Clopton  
Mr. Ralph L. Alexander  
Mr. William L. Bowers, Jr.

---

UNITED STATES COURT OF APPEALS  
FIFTH CIRCUIT

OFFICE OF THE CLERK

December 23, 1977

Mr. Glenn L. Morgan  
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New Orleans, LA 70151

No. 74-2586 — J. Henry Schroeder Banking Corp. v. W.  
Michael Blumenthal, etc., ET AL. \* \* \* \* \* Ben R.  
Hendrix v. J. Henry Schroeder

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MANDATE STAYED TO AND  
INCLUDING January 22, 1978

Dear Counsel:

The court has this day granted a stay of the issuance of  
the mandate to the date as shown above. If during the  
period of the stay there is filed with the clerk of this  
court a notice from the clerk of the Supreme Court that  
the party who has obtained the stay has filed a petition  
for the writ in that court, the stay shall continue until  
final disposition by the Supreme Court. Upon the fil-  
ing of a copy of an order of the Supreme Court deny-  
ing the petition for writ of certiorari the mandate shall  
issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effec-  
tive July 1, 1970, a record is no longer required in con-  
nection with an application for writ of certiorari, and  
therefore will not be routinely prepared by this office  
(38 LW 3502).

A copy of the opinion, judgment and denial of rehear-  
ing are still required by the Supreme Court to be incor-  
porated as an appendix to your petition. Enclosed are  
copies of the said documents which have been entered  
in this cause.

Very truly yours,  
EDWARD W. WADSWORTH,  
Clerk

/s/ SUSAN M. GRAVOIS  
Deputy Clerk

enc.

cc: Mr. Benjamin S. Hardy  
Mrs. Ben R. Hendrix



Supreme Court, U. S.  
**FILED**

**APR 10 1978**

MICHAEL RODAK, JR., CLERK

**IN THE**

**Supreme Court of the United States**

**OCTOBER TERM, 1977**

**No. 77-1259**

**BEN R. HENDRIX TRADING CO., INC.,**  
Petitioner,

**versus**

**J. HENRY SCHRODER BANKING CORPORATION,  
CLAUDIO CASTANEDA, SHERIFF OF HIDALGO  
COUNTY, TEXAS, W. MICHAEL BLUMENTHAL,  
SECRETARY OF THE TREASURY OF THE UNITED  
STATES, ALAMO EXPRESS, INC., KEN KELLAR, d/b/a  
EXPORTS, INC. AND JUD BRADY, d/b/a BRADY'S,**  
Respondents.

**BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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d/b/a Exports, Inc., and Jud  
Brady, d/b/a Brady's**

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1977

---

No. 77-1259

---

BEN R. HENDRIX TRADING CO., INC.,  
Petitioner,

versus

J. HENRY SCHRODER BANKING CORPORA-  
TION, CLAUDIO CASTANEDA, SHERIFF OF  
HIDALGO COUNTY, TEXAS, W. MICHAEL  
BLUMENTHAL, SECRETARY OF THE TREASURY  
OF THE UNITED STATES, ALAMO EXPRESS, INC.,  
KEN KELLAR, d/b/a EXPORTS, INC. AND JUD  
BRADY, d/b/a BRADY'S,  
Respondents.

---

BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

OPINIONS BELOW

Petitioner fails to include in its Appendix the opin-  
ion of the district court, and thus that opinion is in-  
cluded in the Appendix attached hereto.

## CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES OR REGULATIONS CONCERNED

In addition to those discussed in Hendrix' Petition, the Constitutional provisions, treaties, statutes, ordinances or regulations involved are 28 U.S.C., Section 1331:

### § 1331. *Federal question; amount in controversy; costs*

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of \$10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

## 19 U.S.C., Section 1483:

### § 1483. *Consignee as owner of merchandise*

For the purposes of this subtitle —

(1) All merchandise imported into the United States shall be held to be the property of the person to whom the same is consigned; and the holder of a bill of lading duly indorsed by the consignee therein named, or, if consigned to order, by the consignor, shall be deemed the consignee thereof. The underwriters of abandoned merchandise and the salvors of merchandise saved from a wreck at sea or on or along a coast of the United States may be regarded as the consignees.

(2) A person making entry of merchandise under the provisions of subdivision (h) or (i) of section 1484 of this title (relating to entry on carrier's certificate and on duplicate bill of lading, respectively) shall be deemed the sole consignee thereof.

## 19 U.S.C., Section 1484(j):

### 19 § 1484 *CUSTOMS DUTIES*

#### *Release of merchandise*

(j) Merchandise shall be released from customs custody only to or upon the order of the carrier by whom the merchandise is brought to the port at which entry is made, except that merchandise in a bonded warehouse shall be released from customs custody only



to or upon the order of the proprietor of the warehouse. The customs officer shall return to the person making entry the bill of lading (if any is produced) with a notation thereon to the effect that entry for such merchandise has been made. The customs officer shall not be liable to any person in respect of the delivery of merchandise released from customs custody in accordance with the provisions of this section. Where a recovery is had in any suit or proceeding against a customs officer on account of the release of merchandise from customs custody, in the performance of his official duty, and the court certifies that there was probable cause for such release by such customs officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such customs officer, but the amount so recovered shall, upon final judgment, be paid out of moneys appropriated from the Treasury for that purpose.

19 U.S.C., Section 1555:

§ 1555. *Bonded warehouses*

Buildings or parts of buildings and other inclosures may be designated by the Secretary of the Treasury as bonded warehouses for the storage of imported merchandise entered for warehousing, or taken possession of by the appropriate customs officer, or under seizure, or for the manufacture of merchandise in bond, or for the repacking, sorting, or clean-

ing of imported merchandise. Such warehouses may be bonded for the storing of such merchandise only as shall belong or be consigned to the owners or proprietors thereof and be known as private bonded warehouses, or for the storage of imported merchandise generally and be known as public bonded warehouses. Before any imported merchandise not finally released from customs custody shall be stored in any such premises, the owner or lessee thereof shall give a bond in such sum and with such sureties as may be approved by the Secretary of the Treasury to secure the Government against any loss or expense connected with or arising from the deposit, storage, or manipulation of merchandise in such warehouse. Except as otherwise provided in this chapter, bonded warehouses shall be used solely for the storage of imported merchandise and shall be placed in charge of a proper officer of the customs, who, together with the proprietor thereof, shall have joint custody of all merchandise stored in the warehouse; and all labor on the merchandise so stored shall be performed by the owner or proprietor of the warehouse, under supervision of the officer of the customs in charge of the same, at the expense of the owner or proprietor. The compensation of such officer of the customs and other customs employees appointed to supervise the receipt of merchandise into any such warehouse and deliveries therefrom shall be reimbursed to the Government by the proprietor of such warehouse.

and 19 U.S.C., Section 1557:

*§ 1557. Entry for warehouse; warehouse period; drawback*

(a) Any merchandise subject to duty, with the exception of perishable articles and explosive substances other than firecrackers, may be entered for warehousing and be deposited in a bonded warehouse at the expense and risk of the owner, importer, or consignee. Such merchandise may be withdrawn, at any time within three years from the date of importation, for consumption upon payment of the duties and charges accruing thereon at the rate of duty imposed by law upon such merchandise at the date of withdrawal; or may be withdrawn for exportation or for transportation and exportation to a foreign country, or for shipment or for transportation and shipment to the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or the island of Guam, without the payment of duties thereon, or for transportation and rewarehousing at another port or elsewhere, or for transfer to another bonded warehouse at the same port: *Provided*, That the total period of time for which such merchandise may remain in bonded warehouse shall not exceed three years from the date of importation. Merchandise upon which the duties have been paid and which shall have remained continuously in bonded warehouse or otherwise in the custody and under the control of customs officers, may

be entered or withdrawn at any time within three years after the date of importation for exportation or for transportation and exportation to a foreign country, or for shipment or for transportation and shipment to the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or the island of Guam, under such regulations as the Secretary of the Treasury shall prescribe, and upon such entry or withdrawal, and exportation or shipment, the duties thereon shall be refunded.

(b) The right to withdraw any merchandise entered in accordance with subsection (a) of this section for the purposes specified in such subsection may be transferred upon compliance with regulations prescribed by the Secretary of the Treasury and upon the filing by the transferee of a bond in such amount and containing such conditions as the Secretary of the Treasury shall prescribe. The bond shall include an obligation to pay, with respect to the merchandise the subject of the transfer, all unpaid regular, increased, and additional duties, all unpaid taxes imposed upon or by reason of importation, and all unpaid charges and exactions. Such transfers shall be irrevocable, shall relieve the transferor from all customs liability with respect to obligations assumed by the transferee under the bond herein provided for, and shall confer upon the transferee all rights to the privileges



provided for in this section and in sections 1562 and 1563 of this title which were vested in the transferor prior to the transfer. The transferee shall also have the right to receive all lawful refunds of money paid by him to the United States with respect to the merchandise the subject of the transfer, and shall have the right to file a protest under section 514 of this Act to the same extent that such right would have been available to the transferor. Notice of liquidation shall be given to the transferee in the form and manner prescribed by the Secretary of the Treasury. A transferee may further transfer the right to withdraw merchandise, subject to the provisions of this subsection relating to original transfers.

(c) Merchandise entered under bond, under any provision of law, may, upon payment of all charges other than duty on the merchandise, be destroyed, at the request and at the expense of the consignee, within the bonded period under customs supervision, in lieu of exportation, and upon such destruction the entry of such merchandise shall be liquidated without payment of duty and any duties collected shall be refunded.

#### STATEMENT OF THE CASE

These Respondents are dissatisfied with the Statement of the Case and the Statement of Facts as set forth in the Petition filed by Ben R. Hendrix Trading Co., Inc. (hereinafter called Hendrix) and hereby submit their own statement of the case.

This controversy originated when J. Henry Schroder Banking Corporation (hereinafter called Schroder) filed suit in a state district court in Texas to recover a sum due on notes executed and delivered to Schroder by Hendrix. Schroder caused a writ of sequestration to issue in that cause, under which writ was seized certain merchandise, consisting primarily of liquor and wines, owned by Hendrix and located in Customs bonded warehouses. After negotiations between their respective attorneys, a compromise agreement was executed by the parties. Pursuant to the agreement, a consent judgment was executed by the Attorney for Hendrix, which judgment provided that Schroder recover the balance owing on the notes together with interest and attorneys' fees. The judgment further provided for the foreclosure of Schroder's security interest in the inventory of Hendrix that had been previously sequestered and for judicial sale of such property. The compromise agreement set forth a plan for sale of the goods that had been sequestered and disposition of the proceeds of such sale.

The plan for sale of the merchandise set forth in the compromise agreement was never carried out, and the merchandise remained unsold. The consent judgment was signed by the judge of the state court and has since become final. After the judgment had been signed and entered, orders of sale for the previously sequestered goods were issued. Schroder also obtained the issuance of a post-judgment writ of garnishment and had it served upon Alamo Express, Inc., which was at the time of service of the writ in possession of additional of liquor and other merchandise belonging to Hendrix.



The orders of sale directed the sheriff to insure that the sale be conducted in compliance with Customs laws and regulations, that the sale be made only to a Customs bonded dealer, that all paperwork required by Customs to transfer merchandise in bond be executed, and that the purchaser be responsible for payment of all Customs duties and Internal Revenue taxes owing on the goods. Despite this language protecting governmental interests, Customs officials flatly stated that they would not recognize any of the state court orders or writs and that they would not release the merchandise to anyone who might purchase it at judicial sales held under state court authority. The garnished goods were not sold by the state court, but there was an attempted judicial sale of the goods subject to the orders of sale.

Schroder then filed this action in the district court below, seeking declaratory judgment that the judicial sales were valid and must be recognized by Customs officials. Schroder further sought a writ of mandamus to compel Customs officials to release the goods that had been the subject of the attempted sales to the firms purchasing the goods at the sales, Ken Kellar, D/B/A Exports, Inc. and Jud Brady, D/B/A Brady's. Hendrix sought a declaration that the attempted sales and seizures were void, that the officers of the state court and the purchasers at the judicial sales were without power to interfere with the goods and that Customs should completely disregard the state court orders and, upon the request of Hendrix, release the goods from Customs bond to Hendrix for shipment out of the country in accordance with standard Customs procedure. Jurisdiction of the claims of both Schroder and Hendrix was based upon 28 U.S.C., Section 1331.

Trial was held, after which the district court below ruled that the sales that had been attempted were void because the orders of sale were not directed to the warehousemen. The district court denied Schroder's request for a writ of mandamus. The district court added, however, that judicial sales by a state court of merchandise in Customs bond are valid if the warehousemen holding the goods are made parties to the foreclosure proceedings and if the orders of sale are directed to them. The district court below declared that the goods were validly *in custodia legis* of the state district court for resale in accordance with the procedure outlined in the ruling of the district court or other disposition. Hendrix and the Customs officials appealed.

After the appeal was docketed, Hendrix voluntarily filed a Petition under Chapter XI of the Bankruptcy Act. Pursuant to an order in the bankruptcy proceeding, all the merchandise that was the subject of the attempted judicial sales and all the merchandise that was garnished on the Alamo trucks was sold by a receiver. Both Customs officials and Hendrix recognized that the bankruptcy court had power to make such a sale. The Customs officials transferred the merchandise that was sold to the purchasers. Hendrix owns no other merchandise or goods under Customs bond and is no longer actively involved in importing and exporting bonded merchandise. Customs and all the other parties except Hendrix then urged the Fifth Circuit to dismiss the appeal as moot, and the Fifth Circuit did so in its opinion of October 11, 1977.

### REASONS FOR DENYING THE WRIT

Hendrix bases its application for writ of certiorari upon the ground that this case presents an important question of federal law which has not been and should be settled by this Court. It also argues that this Court's power of supervision is called for by the sanction of a departure from the accepted and usual course of judicial proceedings. As pointed out below, no unique, undecided, or important federal question was dealt with in the opinion of the Court of Appeals for the Fifth Circuit. Instead, that court simply dismissed the appeal of Hendrix as moot. That action was required by firmly established precedents of this Court.

In its Petition, Hendrix lists only the mootness question in the section setting forth the questions presented. At other places in its Petition, however, it discusses several other questions. As pointed out below, these questions were either correctly decided by the district court below or not presented to it and thus waived.

#### A.

**An Appeal By An Owner Of Goods In Customs Bond From A Judgment Declaring That A State Court Has Jurisdiction To Order The Seizure And Sale Of Such Goods Becomes Moot When The Owner Voluntarily Files A Petition Under Chapter XI Of The Bankruptcy Act And The Bankruptcy Court Orders The Goods Sold.**

The real and immediate controversy that gave rise to the actions by Hendrix and Schroder involved

whether control of the merchandise would be with Hendrix on the one hand, or with the state court officers and those who purchased it at the judicial sales, on the other. Since the goods have now been sold in an admittedly valid manner and are in the hands of third parties, it is clear that none of the parties to the controversy below can be declared to have any right of control over the goods. Thus the real and immediate controversy no longer exists. Since Hendrix owns no other merchandise in bond and has ceased to be active in the business of importing and exporting bonded merchandise, there is no likelihood that a similar controversy might arise among these parties in the future. Therefore, the Fifth Circuit was correct in holding the dispute moot.

In its Petition Hendrix does not argue with the proposition that there is no longer any live dispute regarding the right to possession and control of the merchandise. Instead, it argues that this controversy is not moot because the original decision of the district court below was supposedly relied upon by the bankruptcy judge in determining the distribution of the proceeds of sale of Hendrix' merchandise. The relevance of the decision of the district court below to the proper distribution of the proceeds in the bankruptcy court is debatable. It is quite clear, however, that the possibility that the district court's ruling might be relied upon as precedent in some collateral proceeding cannot breathe life into this controversy that has clearly become moot. Instead, as pointed out by the Fifth Circuit, it would be premature for an appellate court reviewing this case to concern itself with the distribution of proceeds in the bankruptcy court. In the



first place, Hendrix failed to timely perfect its appeal from the ruling of the bankruptcy court, and a motion to dismiss the appeal is now being prepared. Even if the appeal is not dismissed and even if one of the issues dealt with by the district court below becomes relevant to the bankruptcy proceedings, that issue should be resolved through the normal route of appeal from the bankruptcy judge to the district court and such further appeals as may be appropriate.

Hendrix argues that the issue of the validity of state court seizure of goods under Customs' bond should be determined by this Court despite the absence of a live controversy since it is an issue "capable of repetition, yet evading review" under the rule of such cases as *Moore v. Ogilvie*, 384 U.S. 814 (1969). Hendrix is no longer in the business of handling bonded merchandise, and the Fifth Circuit was correct in concluding that it is unlikely that Hendrix will be faced in the future with a state court seizure of bonded merchandise. Hendrix has no assets other than those sold in the bankruptcy proceeding, but it owes debts that exceed the proceeds of that sale by approximately one million dollars.

Although other import-export firms might be the subject of such a collection procedure, there is certainly no reason to believe that these other firms would all have their goods sold in bankruptcy prior to a determination of the validity of the seizure. Moreover, as Hendrix admits in its Petition, it or any other firm in a similar situation could raise the question of the validity of a seizure of goods in Customs' bond by filing a damage suit for wrongful seizure. Hendrix has never

sought such damages in this or any other proceeding, but the existence of that possibility precludes the issue of the validity of the seizures from being classified as one "evading review". It is made clear in *DeFunis v. Odegaard*, 416 U.S. 312, 319 (1974), that this exception from the traditional mootness doctrine utilized in such cases as *Moore v. Ogilvie*, 384 U.S. 814 (1969), is a very limited one reserved for exceptional situations not present in the case before this Court.

Finally, Hendrix argues that this matter cannot be moot because the appellate costs were taxed against it through the ruling of the Fifth Circuit. Even in an appeal that has become moot, there are costs that must be taxed against someone, and the Fifth Circuit was correct in taxing them against Hendrix. Rule 39(a) of the Federal Rules of Appellate Procedure clearly contemplates that costs shall generally be taxed against the appellant in the event of dismissal of an appeal.

#### B.

#### Not Having Complained Of A Prejudgment Seizure In The Court Below, Hendrix Is Precluded From Making Such A Complaint On Appeal.

Hendrix neither pleaded nor proved in the district court below that the merchandise in question was originally seized by a writ of sequestration issued prior to Schroder's judgment and that Hendrix had no opportunity for hearing prior to the seizure. Undoubtedly, the reason for this failure to make an issue of prejudgment seizure is that at the time of the commencement of the action below the merchandise



was being held pursuant to orders issued only *after* Schroder secured its judgment against Hendrix. Since the object of Hendrix in instituting the action below was to gain control of the merchandise and since at the time of the action the control of Hendrix was precluded by postjudgment and not prejudgment orders, complaint of prejudgment seizure would not have allowed Hendrix to receive the relief it desired.

Since this issue was not presented to the trial court and was not decided by the Fifth Circuit, there is no reason that this Court should grant a writ of certiorari to consider it.

#### C.

##### **Hendrix Released Any Cause Of Action It May Have Had Against Schroder By Virtue Of The Prejudgment Sequestration.**

In the compromise agreement executed by Hendrix and Schroder subsequent to the initial sequestration, Hendrix released Schroder from any and all claims, demands or causes of action connected with the sequestration. This agreement was negotiated between an attorney for Schroder and an attorney for Hendrix. It has been held that a right to a hearing may be waived even prior to the origination of a controversy when the waiver is negotiated between corporate parties represented by competent counsel. *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 171 (1972). Therefore, the release and waiver by Hendrix, which occurred only after the origination of the controversy and which was negotiated between counsel for corporate parties, is clearly valid.

#### D.

##### **Customs Laws Do Not Provide Debtors A Sanctuary From Payment Of Their Debts By Preventing The Recognition Of An Order Of A State Court Transferring Title To Bonded Merchandise And The Right To Withdraw It From Bond When The Order Fully Insures That There Will Be No Evasion Of Duties And Charges.**

Hendrix relies upon *Harris v. Dennie*, 8 U.S. 422 (1830), for the proposition that goods in Customs' bond are immune from seizure by state court officials by virtue of the laws regulating the storage of goods in Customs' bond, 19 U.S.C., Sections 1483, 1484(j), 1555 and 1557. Assuming that *Harris* can be construed to support such a proposition, it was modified in *Conrad v. Pacific Ins. Co.*, 10 U.S. 110 (1832), in which it was held that

"(*Harris v. Dennie*) decided no more than that no creditor could by any attachment or process, take the goods upon their importation out of the possession of the United States, until the lien of the United States for the duties accruing thereon was actually discharged, either by payment of duties, or by giving security therefor . . ." 10 U.S. at 111-112.

In the case before this Court, the purchasers of the goods at the judicial sales were required by the orders of sale to execute the standard transferee bond required by Customs that secures the payment of all

duties. Therefore, security having been given for the payment of the duties, the actions of the state officials do not contravene *Harris* as interpreted by *Conrad*.

The only federal case squarely in point, *General Exporting Co. v. Star Transfer Line*, 136 F2d 329 (6th Cir. 1943) was followed by the district court below. In its Petition Hendrix cites a Texas case, *Galveston H. & S.A. Ry. Co. v. Terrazas*, 171 S.W. 303 (Tex.Civ.App. — El Paso 1914, no writ), and argues that federal courts are bound to follow the Texas case rather than the decision of the Sixth Circuit. The question whether Customs' laws and regulations prevent state court action of the type at issue in the case before this Court is undoubtedly a federal one, and federal courts are compelled to follow the decisions of state courts only in situations in which the decision is governed by state law. *Erie R. Co. v. Tomkins*, 304 U.S. 64 (1938).

The purpose of the Customs laws and regulations at issue is to protect the interests of the United States, and those interests were fully protected in connection with the seizures in question. A ruling that the seizures were invalid would only further the interest of Hendrix and other debtors seeking to avoid payment of valid and final judgments.

#### E.

**The General Agreement On Tariffs And Trade Cannot Be Construed To Prevent A State Court From Transferring Title To Bonded Merchandise And The Right To Withdraw That Merchandise From Bond Because Such A Con-**

**struction Would Not Further The Objectives Of The Agreement And Would Only Provide Debtors A Sanctuary From The Payment Of Their Debts.**

Hendrix raises the novel theory that the state court action complained of below contravenes the General Agreements on Tariffs and Trade, an international agreement entered into by the United States and a number of other countries. The treaty provides that commerce moving into or out of a country shall not be subject to unnecessary delays or restrictions. The district court below found that the delay in the transit of goods in bond caused by a lien foreclosure suit is not an unnecessary delay within the meaning of the treaty. This ruling is correct. The obvious purpose of the treaty is to prohibit severe restrictions such as licensing and permit procedures — not judicial sales, which could have only the most minimal and remote effect upon the total mass of commerce crossing the United States for another country. The purpose is not, as the argument of Hendrix necessarily suggests, to provide the debtors a sanctuary for the payment of their debts.

#### CONCLUSION

The Court of Civil Appeals for the Fifth Circuit dismissed the appeal as moot, as it was clearly required to do under the firmly established precedents of this Court. If it granted certiorari, this Court would not be faced with any important and unsettled question of federal law. Nor is review of this case necessary to correct departure from the accepted and usual course

of judicial proceedings, as there was no such departure below. Therefore, the writ should be denied.

Respectfully submitted,

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Corporation, Claudio  
Castaneda, Ken Kellar, d/b/a  
Exports, Inc., and Jud Brady,  
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## CERTIFICATE OF SERVICE

I, Gary Gurwitz, a member of the Bar of the Supreme Court of the United States and counsel of record for J. Henry Schroder Banking Corporation, Claudio Castaneda, Ken Kellar, d/b/a Exports, Inc., and Jud Brady, d/b/a Brady's herein, hereby certify that on April \_\_\_, 1978, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Brief In Opposition To Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit on each of the parties herein, as follows:

Mr. Glenn L. Morgan  
Attorney of Record for Ben R. Hendrix Trading  
Company, Inc.  
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Mr. William Bowers  
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Mr. Wade H. McCree, Jr.  
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Mr. James R. Clopton  
Attorney for Victor Guerra, Individually and  
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by depositing such copies in the United States Post Office, New Orleans, Louisiana, with first class postage prepaid, by Certified Mail, Return Receipt Requested, properly addressed to the post office address as shown above.

All parties required to be served have been served.

Dated the \_\_\_\_ day of April, 1978.

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FOR J. Henry Schroder Bank-  
ing Corporation, Claudio  
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d/b/a Brady's.

## APPENDIX

J. HENRY SCHRODER BANKING CORPORATION

versus

George P. SCHULTZ, Secretary of the Treasury of the  
United States, et al.

BEN R. HENDRIX TRADING CO., INC.

versus

J. HENRY SCHRODER BANKING CORPORATION  
et al.

Civ. A. Nos. 73-B-127, 73-B-128.

United States District Court,  
S. D. Texas,  
Brownsville Division.

Feb. 22, 1974.

Supplemental Memorandum  
April 25, 1974.

Consolidated action for declaratory judgment involving bonded goods located in warehouses in Texas counties. The United States District Court for the Southern District of Texas, Brownsville Division, Garza, J., held that goods in bond are under joint custody of collector of customs and warehouseman;

that the Texas District Court had jurisdiction to entertain an in personam lien foreclosure; that a state court may validly order a sale of property in bonded customs warehouses pursuant to in personam foreclosure suit on secured note covering the warehoused goods; that the amended order of sale was unenforceable as against warehouseman and customs where warehouseman was not a party to suit; that a delay in transit of goods in bond caused by lien foreclosure on note secured by warehouse goods is not a necessary delay and is not governed by provision of general agreement on trade and tariffs; and that the federal court is not a forum for appellate review of state district court judgments.

Judgment in accordance with opinion.

#### MEMORANDUM AND ORDER

GARZA, District Judge.

This action originally started out as two separate suits, Civil Actions 73-B-127 and 73-B-128, filed pursuant to the Declaratory Judgment Act, 28 U.S.C.A. § 2201, which were consolidated by Order of this Court on November 6, 1973. Jurisdiction is predicated on diversity, 28 U.S.C.A. § 1332 and 28 U.S.C.A. § 1331, in that this action arises under the laws of the United States. For purposes of simplification, the parties will be referred to as they were, or would have been, aligned in the first suit, Civil Action 73-B-127.

The subject of this lawsuit is bonded goods, some of which were in transit, most of which is liquor, and all

of which are presently located in bonded warehouses in the Texas counties of Webb and Hidalgo. Plaintiff-Cross Defendant J. Henry Schroder Banking Corporation, hereinafter referred to as "Bank", is a business organized under the laws of New York and is here seeking a declaratory judgment that certain attempted Sheriff's sales were not in violation of federal law; the Bank is also seeking a Writ of Mandamus to compel Customs officers to release the above mentioned bonded goods pursuant to a state court order, and an injunction to prevent Ben R. Hendrix Trading Co., Inc. from removing any of the goods in bond from the warehouses.

Defendant-Cross-Plaintiff Ben R. Hendrix Trading Co., Inc., hereinafter referred to as "Hendrix", is a Louisiana corporation, and is here seeking a declaratory judgment that the attempted Sheriff's sales and the underlying state court order are void.

Defendant George P. Schultz, Secretary of the Treasury of the United States; Shelby L. White, Acting Regional Commissioner of the United States Bureau of Customs; Anthony J. P. Farris, United States Attorney for the Southern District of Texas; and Elliot Richardson, Attorney General of the United States, all hereinafter referred to as "Customs", seek a finding by this Court that Customs officers are not bound by processes and orders of a state court which seek to control goods in Customs bond.

Defendant Victor M. Guerra, a resident of Hidalgo County, d/b/a Guerra Customs Bonded Warehouse; Defendant Alamo Express, Inc., a Texas Corporation; and SAIA Motor Freight Line, Inc., a Louisiana corporation, all hereinafter referred to as "Intervenors", are here seeking to protect their freight and warehouseman's liens.

Defendant Claudio Castaneda is the Sheriff of Hidalgo County.

Defendant Jud Brady, d/b/a Brady's, is a resident of Hidalgo County, Texas, and transacts an export business in the state of Texas.

Defendant Ken Kellar, d/b/a Exports, Inc., a Washington corporation, is a resident of the state of Washington and transacts an exporting business in the state of Texas.

Since the year 1968, the Bank has loaned substantial sums of money to Hendrix to finance its inventory. These loans were backed by a secured lien in favor of the Bank on Hendrix' assets, which, because of the nature of its exporting business, were continually changing. When Hendrix became unable to pay the amounts due on its notes, the Bank filed suit against Hendrix on April 25, 1973, in the 93rd District Court of Hidalgo County, Case # B26651, seeking foreclosure of the lien and a money judgment in the amount of \$295,465.97, plus costs. On the motion of the Bank, the state court sequestered all of Hendrix' assets located in either Hendrix' own warehouse or the Guerra's Custom Bonded Warehouse in Hidalgo County. As

will be discussed later, other goods that were in transit at the time of this sequestration would also become involved.

The Bank and Hendrix continued to work out their problems and soon reached a now controversial "compromise agreement" on May 22, 1973, wherein Hendrix admitted its debt to the Bank and agreed to the entry of a judgment against itself in the state lawsuit in the sum of \$295,465.97, plus costs, interest and attorneys' fees. The judgment was to be paid out of the proceeds of the sale of the above sequestered goods to Brady and Kellar, the buyers that the Bank had located. The sequestration was to expire on entry of the judgment, and Hendrix agreed that it would issue the necessary documents to effectuate the sale. In the meantime, however, Hendrix could also sell the goods on its own if, prior to June 2, 1973, Hendrix could find a buyer willing to pay more than the \$230,000.00 that the Bank's buyers had offered. The compromise agreement further stated that the judgment would also foreclose the Bank's lien on all of Hendrix' property not sequestered by the court's order, but this part of the judgment would not take effect until ninety days after the signing of the compromise agreement, giving the Bank an option should Hendrix fail to carry out as agreed the sale of the sequestered goods. The Bank additionally had the right to foreclose immediately on these other non-sequestered assets, if Hendrix tried to fraudulently remove or conceal any of its property from the reach of the Bank. Finally, the Bank agreed to fully release Hendrix from any and all indebtedness upon the payment to the Bank of \$300,000.00, on or before June 1, 1973. The agreement was signed by G. H.



Laube, a vice president, for the Bank, and by Mrs. Claire B. Wayne for Hendrix. The actual judgment of the state court was signed on behalf of Hendrix by Horace Hall, an attorney; the judgment was not signed by anyone on behalf of the Bank, though the name of Charles Murray, also an attorney, and the law firm of Atlas, Hall, Schwarz, Mills, Gurwitz & Bland appear in print. The judgment was duly entered on May 31, 1973.

By June of 1973, the Bank had located additional property of Hendrix in the form of bonded liquor in transit, carried by Alamo Express, Inc. in nine sealed trailers. The Bank in June, filed an application for Writ of Garnishment against Alamo Express in the 92nd District Court of Hidalgo County, Case No. A-11669. Alamo answered by way of interpleader of the Bank and the United States Bureau of Customs to determine which of the parties had rights to the merchandise contained in the trailers. This action is still pending in the state court. All parties later agreed to warehouse these goods in transit, so as to release the Alamo trailers back into line service, and this Court so ordered on August 31, 1973.

The spirit of compromise soon evaporated and relations between Hendrix and the Bank rapidly deteriorated. According to the Bank, Hendrix did not carry through with the sale of the sequestered goods and started to dispose of its property, contrary to the compromise; fearing the loss of other secured property, the Bank, pursuant to the option contemplated in the compromise agreement, obtained Orders of Sale on June 18, 1973, directing the Sheriffs of Hidalgo and

Webb Counties to hold public sales of the goods previously sequestered. Before these orders could be carried out, Mr. Palmer Kelly, Assistant United States Attorney for the Southern District of Texas, informed the Bank that Customs objected to this type of sale and suggested a reformed Order of Sale. Amended Orders of Sale that fully protected the interests of the Bureau of Customs and directed that the sales be carried out in conformity with all applicable federal laws were issued on July 6, 1973. However, on that same date, Mr. Shelby White, Acting Regional Commissioner of the United States Bureau of Customs, by letter, informed the attorneys for the Bank that, based on his understanding of relevant case law and statutes, goods in Customs bonded warehouses were not subject to any state orders, regardless of the form in which they were issued, and that Customs would simply not recognize any such orders. Pursuant to these Amended Orders of Sale, two Sheriff's sales were attempted in July of 1973, but in both instances, Customs refused to release the property despite the presence of purchasers with cash in hand who were ready to pay all customs duties and internal revenue taxes owing on said property.

On July 6, 1973, Hendrix joined the assault on the state court orders by filing its Bill of Review in the 93rd District Court of Hidalgo County, claiming that the underlying consent judgment had been obtained by a fraud on the court and was, therefore, null and void.

Despite the abundance of jurisdictional grounds, neither Hendrix nor the Bank sought removal to federal court, but this noninvolvement terminated on

August 13, 1973, with the filing of two suits for a Declaratory Judgment in this Court. In the first suit, Civil Action 73-B-127, the Bank sued George P. Shultz, Secretary of the Treasury of the United States; Shelby L. White, Acting Regional Commissioner of the United States Bureau of Customs; Anthony J. P. Farris, United States Attorney for the Southern District of Texas; Elliot Richardson, Attorney General of the United States; Ben R. Hendrix Trading Co., Inc.; and Victor M. Guerra, Individually and d/b/a Guerra's Custom Bonded Warehouse.

The second federal suit, Civil Action 73-B-128, was brought by Hendrix against J. Henry Schroder Banking Corporation; Claudio Castaneda, Sheriff of Hidalgo County, Texas; Cleburne Maier, Regional Commissioner of Customs; Alamo Express, Inc.; Ken Kellar, d/b/a Exports, Inc.; and Jud Brady, d/b/a Brady's.

On January 3, 1974, a trial before the Court was held.

Notwithstanding this rather complex statement of facts, there is but one question of law around which all other issues revolve: May a state court validly order a sale of property in bonded customs warehouses pursuant to an *in personam* foreclosure suit on a secured note covering the warehoused goods?

Goods in bond are under the joint custody of the Collector of Customs and the warehouseman. It is this joint custody that gives rise to the fiction that the goods are not really in the host state, but are merely passing through it. Hendrix has cited to the Court a

long line of cases to support this fiction and apparently reads them to mean that bonded goods are beyond state processes for all purposes. In addition, both Hendrix and Customs have cited various statutes, notably, 19 C.F.R. 19.6c, note 11, providing that:

Imported goods in bonded warehouses are exempt from taxation or judicial processes of any State or subdivision thereof . . . .

and 28 U.S.C. § 2463:

All property taken or detained under any revenue law of the United States shall not be repleviable, but shall be deemed to be in the custody of the law and subject only to the orders and decrees of the courts of the United States having jurisdiction thereof . . . .

and 19 U.S.C. § 1484(j):

Merchandise [in a bonded warehouse] shall be released from customs custody only to and upon the order of the carrier by whom merchandise is brought to the port at which entry is made, except that merchandise in a bonded warehouse shall be released from customs custody only to or upon the order of the proprietor of the warehouse . . . .

When read in conjunction with the cases cited by Hendrix, these statutes seem to form a diamond-hard exterior which a state court cannot penetrate. This was certainly the approach that earlier courts had taken.



In *Harris v. Dennie*, 3 Pet. 292, 28 U.S. 292, 7 L.Ed. 683 (1830), the Court stated that:

The United States having a lien on the goods for the payment of the duties accruing thereon, and being entitled to a virtual custody of them from the time of their arrival in port until the duties are paid or secured, any attachment by a state officer is an interference with such lien and right of custody; and being repugnant to the laws of the United States, is void . . . .

But time has withered this rather singular approach. Federal Courts have acknowledged the States' right to regulate bonded merchandise for the safety of its citizens or to prevent bonded liquors from entering the stream of state commerce without prior payment of the appropriate taxes. See *Epstein v. Lordi*, 261 F.Supp. 921 (D.C.N.J.1966); *Hostetter v. Idlewild Bon-Voyage Liquor Corp.*, 377 U.S. 324, 84 S.Ct. 1293, 12 L.Ed.2d 350 (1964). At the same time, however, the States have not been allowed to impose their own scheme of liquor taxation or regulation on bonded liquor in transit when that liquor is not destined for use or consumption in the warehousing state. *United States v. Gudger*, 249 U.S. 373, 39 S.Ct. 323, 63 L.Ed. 653 (1919); *Collins v. Yosemite Park Co.*, 304 U.S. 518, 58 S.Ct. 1009, 82 L.Ed. 1502 (1938); *Johnson v. Yellow Cab*, 321 U.S. 383, 64 S.Ct. 622, 88 L.Ed. 814 (1944); *Hostetter v. Idlewild Bon-Voyage Liquor Co.*, *supra*; *Ammex Warehouse Co. v. Dept. of Alcoholic Beverage Control*, 224 F.Supp. 546 (S.D.Cal.1963), *aff'd* 378 U.S. 124, 84 S.Ct. 1657, 12 L.Ed.2d 743. *Hendrix* has relied on this line of cases to support its "passing through" theory,

but such reliance is misdirected. These cases did not involve bonded goods as such, but attempts by states to regulate the liquor industry, conflicts regarding state control based on the 21st Amendment and the free flow of interstate commerce. The case before this Court has nothing to do with state regulation of the liquor trade, but with adjudication of title of goods in bond which happen to be distilled spirits. The above cited cases are simply not dispositive of the questions of law raised by the pleadings.

Both *Hendrix* and *Customs* have also cited the case of *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414, 60 S.Ct. 664, 84 L.Ed. 840 (1939). This was a non-liquor case, wherein the City of New York sought to tax sales of fuel from a bonded warehouse to ships engaged in foreign commerce. There the Supreme Court held that the state tax was invalid in light of Congressional regulation of foreign commerce. But like the liquor cases, *McGoldrick* involved interference by a state in its legislative capacity, not in its judicial capacity. Language in *McGoldrick* to the effect that such goods are not part of the common taxable mass of a state is, on its face, limited to legislative interferences with bonded goods and is inapplicable to suits between private parties where the state is acting only as an adjudicator of rights.

The 93rd District Court of Hidalgo County clearly had jurisdiction to entertain an *in personam* lien foreclosure, wherein the named lienholder and the debtor were before the court. The ordered sale, however, is, under Texas law, an *in rem* proceeding, wherein the issuing court must have actual or constructive



custody of the res. The problem that developed when the Sheriff sought as an agent of the court to enforce the judgment arose in a very similar suit in Michigan, *General Exporting Co. v. Star Transfer Line et al.*, 136 F.2d 329 (CA 6 1943), cert. den'd 323 U.S. 724, 65 S.Ct. 56, 89 L.Ed. 581 (1944). In that litigation, Southard and Company, Ltd., of London, sold to General Exporting Company 799 cases of imported Scotch whiskey in bond. On arrival in this country, the purchaser, General Exporting, warehoused the bonded liquor with Star Transfer Line and sold the negotiable warehouse receipts to one John McKeown. Difficulties arose when General Exporting refused to pay the purchase price to Southard and Company, Ltd. The warehouser, Star, became worried about his lien on the goods and sued Southard, General Exporting, and John McKeown in state court. The state court, after impounding the receipts, decreed that Southard was the rightful owner and ordered the warehouseman, Star, to sell the liquor in a manner that would insure that all federal tax would be protected.

Thereafter, General Exporting filed suit in federal district court against Star, Customs, and the judge that presided over the state suit, praying that the Collector of Customs be enjoined from disposing of the whiskey, that the issuing judge be enjoined from taking any further proceedings and that his decree be declared null and void. Star answered that a state court of coordinate jurisdiction had already decided the issues, and that these same issues should not now be re-litigated in federal court. Customs answered that their only interest was in the collection of duties potentially owing to the United States, but that they

would not be bound by orders of a state court which tried to dispose of bonded goods. The federal district court dismissed the suit for want of jurisdiction. On appeal, the Sixth Circuit held that such dismissal was proper. In so holding, it recognized that Customs custody of bonded goods is not exclusive and that state courts can act to settle title disputes involving bonded goods. It further sanctioned the remedy used by the state court: the impounding of the negotiable receipts and the mandated sale of the spirits by the warehouseman.

This Court finds that the *Star* case is similar to the one before the Court in several critical aspects: both cases involved goods in bond which were the subject of a final judgment of a state court; in both cases, the state court issued process and ordered a sale of the goods, and in both cases, Customs, along with a claiming owner who had been dispossessed of title by a state court, argued that state courts cannot exercise any jurisdiction over goods in bond, as jurisdiction is limited to the federal courts. The Sixth Circuit was not persuaded by the arguments concerning federal preemption and the commerce clause of the constitution, and held that state courts may effect any remedy that is not in conflict with the federal interests in the area. It brushed aside the exclusive custody arguments and referred to the cases cited to it to support such arguments, one of which was *Harris v. Denie, supra*, as "ancient authority that furnishes no true guidance toward the disentanglement of the involved issues in the case at bar".

This Court is convinced that the solution reached in the *Star* case is the proper one for the parties before

this Court. State courts are just as competent as this court to foreclose secured liens between private parties. Given that they have the power to adjudicate, they also have the right to enforce their judgments by the means of court ordered sales. Such sales must protect the tax liens of the United States and in all other aspects conform to the applicable federal regulations. The original state court order in the case before this Court apparently did not protect those interests and another order had to be drawn up.

The Amended Order of Sale was more than adequate in its protection of the tax interests of the United States, but it contained one fatal flaw: it was not directed to the warehouseman, nor could it have been since the warehouseman was not a named party in the original suit, nor was he interpled, nor did he intervene. He was not before the court and was, therefore, not subject to its decree. This failure to join the warehouseman is critical in light of the Department of Treasury regulations governing the release of goods in bond, particularly 19 U.S.C. § 1484(j), which specifically provides that goods "shall be released from customs custody only to or upon the order of the proprietor of the warehouse". This regulation is part of a comprehensive scheme governing the management of goods in bond and must be complied with by any court seeking to control such goods. In the *Star* case, the warehouseman was a party to the suit before the state court, and the court's decree was, in part, addressed to him. But such is not the case in this suit. The state judgment in our state suit is, therefore, unenforceable as against the warehouseman and Customs, and they need not comply with it as written.

Hendrix seeks to distinguish the *Star* case on factual and procedural grounds. As to the facts, Hendrix claims that the goods in the *Star* case were intended to be imported into the United States, whereas the goods in the case before this Court were bound for export, and, in fact, could not ever be legally imported into the United States because of their failure to comply with federal Food and Drug requirements. While there is indeed a factual difference between goods merely resting on American soil and goods that are not only resting on our soil but are also going to enter the domestic stream of commerce, the courts have not found this difference to be legally significant and generally recognize the power of the states to control both types of goods consistent with federal statutes. *Epstein v. Lordi, supra*; *Hostetter v. Idlewild Bon-Voyage Liquor Co., supra*.

Hendrix also asserts a procedural distinction, in that there was an actual impoundment of negotiable warehouse receipts in the *Star* case, while in the case before this Court, there was no such impoundment. This is surely a distinction without a difference. The state court does not have to choose, from among the various processes at its command, the same form of process that was used in *Star* to bring itself within the purview of the *Star* holding. What is involved here is the basic question of whether or not a court may issue any type of process over bonded goods; this Court is not concerned with the exact type of process employed.

Hendrix has cited the provisions of the 1947 General Agreement on Trade and Tariffs, a treaty commonly



referred to as GATT, to further support its "passing through" theory. Article V does have some bearing:

1. Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without transshipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this Article 'traffic in transit'.

2. There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.

3. Any contracting party may require that traffic in transit through its territory be entered at the proper custom house, but, except in case of failure to comply with applicable customs laws and regulations, such traffic coming from or going to the territory of other contracting parties shall not be

subject to any unnecessary delays or restrictions and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of service rendered.

Hendrix claims that though this is a presidential agreement, it has been given force and effect by the courts and that such force and effect are necessary for a free flow of goods in foreign commerce. Hendrix also argues that if state interference with foreign commerce were allowed, then the constitutional grant to the executive of the conduct of foreign policy would be frustrated. Two observations here seem relevant. First, GATT was not in force during the *Star* case cited above; second, and more important, the Article quoted proscribes "unnecessary delays or restrictions". This Court finds that a delay in the transit of the goods in bond caused by a lien foreclosure suit on a note secured by those goods is a necessary delay. To hold otherwise would allow GATT-V to become a haven for debtors who then become beyond the reach of any law, state or federal.

There remains the question of what can now be done. The Court must assume that the two principal parties, Hendrix and the Bank, have knowingly and voluntarily chosen to litigate their financial differences in the state courts. The 93rd District Court of Hidalgo County has assumed jurisdiction of a matter of which this Court has concurrent jurisdiction, but comity requires that the suit be allowed to run its course in the



state court system. Questions of fraud and failure to comply with the statutory scheme for Sheriff's sales are questions that must be litigated in the state courts. This Court is not a forum for appellate review of state district court judgments, nor can it correct litigants' failure to bring in necessary parties to that suit, such as the warehouseman.

I, therefore, find that on the authority of *General Exporting Co. v. Star Transfer et al.*, 136 F.2d 329 (CA 6 1943), cert. den'd 323 U.S. 724, 65 S.Ct. 56, 89 L.Ed. 581 (1944), the 93rd District Court of Hidalgo County did have jurisdiction to hear the foreclosure suit that was before it and to enter any orders necessary to protect its jurisdiction or to effectuate its judgments, so long as the orders are directed to the proper parties and comply with the federal statutes regulating the release of bonded goods from bonded warehouses. I further find that the two Amended Orders of Sale did not comply with those federal statutes, particularly 19 U.S.C. § 1484(j), in that the warehouseman was not a party to the original state suit and was not, therefore, subject to the orders of the state court. The Amended Orders of Sale are, therefore, unenforceable as against Customs or the warehousemen. As Hendrix and the Bank originally chose to litigate the lien foreclosure in state court and as the state court accepted jurisdiction of that suit, the parties must return to the state forum to settle their differences.

In light of the validity of the state court processes issued over the bonded goods, this Court finds that it is unnecessary to grant the Bank's request for an injunction; for the same reason, this Court finds that it would

be inappropriate to grant the Bank's Writ of Mandamus to compel the release of the bonded goods.

In summary, this suit started out and continues to be a lien suit between two private corporations. It involves the state not in its executive or legislative roles, but only in its judicial capacity. This alone distinguishes it from most of the authority cited to support the "passing through" theory. The state court foreclosed a lien and ordered a sale of the secured goods; Customs officials refused to draw up the necessary instruments to effectuate that sale, claiming that they were not bound by state court orders. While it is clear that the state could entertain the *in personam* action to foreclose the lien, its judgment must protect federal tax interests, as well as comply with Customs statutes regulating the release of goods in bond.

Whether a good is in a state or merely passing through depends on the interest being protected. There is ample case authority which holds that *liquor* in bond is not in a state for state taxing purposes; at the same time, and not in conflict with the above, there is also ample authority that *goods* in bond are present in a state for purposes of *in personam* lien foreclosures between two private parties. Final destination of goods and compliance with Food and Drug laws for packaging and the like doesn't really change the status of a bonded good. Bonded chattels on their way to Mexico have the same legal character as bonded chattels on their way to Arkansas and are controlled by the same body of federal regulations. Finally, imperfection in the state judgment, such as the alleged fraud, are matters for the state appellate system.

There remains for disposition the intervening claims of the carriers and the warehousemen. Their claims are amply protected under the existing Customs regulations, and nothing in this Memorandum or the Judgment being entered herein will in any way prejudice their liens, and the Bureau of Customs is hereby directed to see that the liens of the Interveners here, Victor M. Guerra, d/b/a Guerra Customs Bonded Warehouse, Alamo Express, Inc. and SAIA Motor Freight Line, Inc., are fully protected under the law.

A Judgment in accordance with this Memorandum is this day being entered.

#### JUDGMENT

In accordance with the Memorandum of this date in the above entitled and numbered cause, this Court declares that the 93rd District Court of Hidalgo County, Texas, did have jurisdiction to entertain the case of Schroder v. Hendrix, Cause # B 26651, and to issue all processes necessary to protect its jurisdiction or effectuate its judgments so long as those processes complied with Customs regulations. This Court further declares that the two Amended Orders of Sale of July 6, 1973, did not comply with Customs regulations and are unenforceable. Plaintiff Schroder Banking Company's requests for an injunction and a Writ of Mandamus are hereby denied.

The causes above cited are hereby dismissed and dropped from the docket of this Court, without prejudice to the rights of the parties to these lawsuits to

enforce their rights either in the state courts or under the Customs laws and regulations.

#### SUPPLEMENTAL MEMORANDUM

This Court entered its Memorandum on the 22nd day of February, 1974, and entered Judgment in accordance with said Memorandum on the same date, in the above entitled and numbered causes. Within the time allotted by the rules, three of the parties have filed motions regarding said Memorandum, which are now before the Court.

The Federal Defendants, who, in fact, can be lumped into the Bureau of Customs, are complaining that this Court did nothing by its Memorandum with regard to its Order of August 31, 1973. They also seek an Order from this Court that the Bureau of Customs and individual Customs officials be exonerated from liability from following either the Orders of this Court or of the State Court.

Alamo Express, Inc. has filed its Motion to Modify or Amend Judgment, also complaining of the fact that this Court did not dispose of its Order of August 31, 1973, and asking that the legal custody and possession of the merchandise warehoused pursuant to that Order be released to them, so that it will be in a position to file a Bill of Interpleader in State Court to secure an adjudication of the rights of all the parties to the goods warehoused.



J. Henry Schroder Banking Corporation has filed a Motion for a New Trial or To Amend Findings and Judgment. One of their main contentions is that the Webb County Order of Sale sold merchandise located only at the warehouse at 1714 Faragot Street, Laredo, Texas, and that this warehouse is owned and operated by Ben R. Hendrix Trading Company, Inc., the original Defendant in the 93rd District Court of Hidalgo County, Texas. While this may be true, the Order of Sale out of the 93rd District Court did not order the warehousemen to sell the property, but instead ordered the Sheriff of said county to sell the property, and their request that I amend my findings and judgment to validate that Order of Sale is denied. Their Motion for a New Trial is also denied. What this Court held by its Memorandum of February 22nd, to which reference is hereby made for all purposes, was that the 93rd Judicial District Court of Hidalgo County, Texas, had jurisdiction to adjudicate the title to the goods in question. The Judgment of that Court foreclosed a lien on the goods belonging to Ben R. Hendrix Trading Company, Inc., which included not only goods that were already warehoused, but those goods which were in the trucks of Alamo Express, Inc. and which were warehoused upon the agreed Order entered by this Court on August 31, 1973. That Order should now be dissolved, and the legal custody of said goods is now returned to Alamo Express, Inc., and for the purpose of complying with Customs regulations, to the warehousemen where they are now located.

Having found and declared that the 93rd Judicial District Court of Hidalgo County, Texas, had jurisdiction over the goods in question, the Bureau of

Customs and its officials must comply with the lawful Orders of that Court with regard to the disposition of the goods in question. The Bureau of Customs and its individual officials are exonerated from any liability for complying with the lawful Orders of that State Court or of this Court.

This Court has indicated that in accordance with Bureau of Customs regulations, if the 93rd Judicial District Court of Hidalgo County, Texas, wants to dispose of said goods, it must direct its Order to the warehousemen, and in the case of the goods which were being transported by Alamo Express, Inc., to the warehousemen and Alamo Express, Inc. In other words, this Court now holds that all of said goods belonging to Ben R. Hendrix Trading Company, Inc. are in *custodia legis* of 93rd Judicial District Court of Hidalgo County, Texas, and they cannot be disposed of, unless upon Orders of that Court lawfully entered, to comply with Customs regulations.

At the time of entering its Memorandum of February 22nd, a further application to intervene was filed in this Court by Francisca Recio de Vela, Individually and as Independent executrix of the Estate of E. G. Vela, Deceased, in which it was claimed certain warehouseman's charges and expenses in connection with the storage of certain wines and alcoholic spirits which were in part the subject of the above suits. Their right to intervene is hereby granted. They, however, stand in the same shoes as the other intervening carriers and warehousemen, and the Bureau of Customs is hereby directed to see that the liens of the Interveners, Victor M. Guerra, d/b/a Guerra Customs



Bonded Warehouse, Alamo Express, Inc., SAIA Motor Freight Line, Inc. and Francisca Recio de Vela, Individually and as Independent Executrix of the Estate of E. G. Vela, Deceased, are fully protected under the law.

The question of whether the Judgment giving rise to the foreclosure Orders of the 93rd Judicial District Court of Hidalgo County, Texas, is valid or not apparently is still in litigation, but that is a matter for the State Courts, as previously held in my Memorandum of February 22nd. An Amended Judgment, in compliance with my Memorandum of February 22nd and this Supplemental Memorandum, is this day being entered.

The Clerk will send copies of this Supplemental Memorandum, together with the Amended Judgment, to counsel for the parties.

#### AMENDED JUDGMENT

In accordance with the Memorandum of February 22, 1974, and the Supplemental Memorandum of this date in the above entitled and numbered causes, this Court declares that the 93rd Judicial District Court of Hidalgo County, Texas, did have jurisdiction to entertain the case of Schroder v. Hendrix, Cause #B 26651, and to issue all processes necessary to protect its jurisdiction or effectuate its judgments, so long as those processes complied with Customs regulations.

This Court further declares that the two Amended Orders of Sale of July 6, 1973, did not comply with

Customs regulations and were and are unenforceable. Plaintiff J. Henry Schroder Banking Corporation's requests for an injunction and a Writ of Mandamus to the Bureau of Customs and its officials are hereby denied.

The Order of this Court of August 31, 1973, is hereby dissolved and the legal possession of the goods which were the subject of that warehousing order is declared to be in Alamo Express, Inc. and, for the purpose of complying with Customs regulations, in the warehousemen with whom the goods were placed. Having found that the goods in question are in *custodia legis* of the 93rd Judicial District Court of Hidalgo County, Texas, the Bureau of Customs and its officials are hereby ordered not to release said goods, except upon orders duly issued by the said 93rd Judicial District Court, which orders shall comply with Customs regulations, in accordance with this Court's Memorandum, and the United States Bureau of Customs and its officials are hereby exonerated from any and all liability for refusing to honor the Orders of Sale heretofore held void in this Court's Memorandum of February 22nd, or for obeying further orders of the 93rd Judicial District Court or from obeying the order of this Court.

Further disposition of the goods in question must be sought by the parties in the 93rd Judicial District Court of Hidalgo County, Texas, which this Court has found has *custodia legis* of said goods. This Judgment is binding on all parties as to those things declared by this Court, and is a Final Judgment herein.